Syed Iskandar bin Syed Jaafar v Kerajaan Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24–63–11 OF 2020
WAN AHMAD FARID J
5 JULY 2022

Constitutional Law — Courts — Reference to Federal Court — Plaintiff made application under s 84 of Courts of Judicature Act 1964 to seek order to stay proceedings to transmit question to Federal Court — Whether question ought to be transmitted to Federal Court for determination — Courts of Judicature Act 1964 s 84

This was an application made under s 84 of the Courts of Judicature Act 1964 ('the CJA'), where the plaintiff sought an order to stay the proceedings in this originating summons ('OS') to enable the court to transmit a question that had arisen as to the effect of the Federal Constitution in the form of a special case to the Federal Court. The question was whether Act A514 which amended art 150 by adding cll (8) and (9) was violative of the basic structure of the Federal Constitution having regard to art 4(1) thereof ('question (ii)'). According to the plaintiff, since the question was novel, the issue merited its determination by the apex court. The first defendant objected to the application. As a general rule, the first defendant submitted that the High Court was entitled to determine constitutional questions at first instance. Save for the sixth defendant which adopted the submission of the first defendant, the remaining defendants were agreeable for question (ii) to be transmitted to the Federal Court for a determination.

Held, dismissing the application with costs:

(1) Section 84(1) of the CJA employed the word 'may'. It denoted discretion which had to be exercised judiciously. The effect of referring the question was to put the OS to an end. The question of bringing the dispute to a speedy and economical end within the meaning of s 84(2) of the CJA no longer arose. Once the Federal Court answered question (ii), the OS would be finally determined. Although procedurally the matter was to be remitted to the court, practically, there was nothing to be deliberated anymore. The rights of the parties in the OS would be finally decided once question (ii) was answered by the Federal Court. The exercise of the court's discretion could only be made if the question, once answered by the Federal Court, would assist the court in determining the main OS. Section 84 of the CJA was not designed to have the effect of disposing of the OS in its entirety, either in favour of the plaintiff or the defendants.

To do so would have the consequence of the Federal Court assuming a first instance jurisdiction outside the scope of art 128(1) of the Federal Constitution. The issue of this nature, though admittedly was of grave significance, ought not to be litigated at the first instance before the Federal Court. Question (ii) was not a challenge under art 128(1) of the Federal Constitution. But to invite the Federal Court to give a determination under s 84 of the CJA would have the effect of the Federal Court assuming an original jurisdiction (see paras 31 & 35–40).

[Bahasa Malaysia summary

Ini adalah permohonan yang dibuat di bawah s 84 Akta Mahkamah Kehakiman 1964 ('AMK'), di mana plaintif memohon perintah untuk menggantung prosiding dalam saman pemula ini ('OS') untuk membolehkan mahkamah merujuk soalan yang telah timbul tentang kesan Perlembagaan Persekutuan dalam bentuk kes khas kepada Mahkamah Persekutuan. Soalannya adalah sama ada Akta A514 yang meminda perkara 150 dengan menambah klausa (8) dan (9) melanggar struktur asas Perlembagaan Persekutuan dengan mengambil kira perkara 4(1) ('soalan (ii)'). Menurut plaintif, memandangkan soalan itu adalah baru, isu itu patut diputuskan oleh mahkamah tertinggi. Defendan pertama membantah permohonan itu. Sebagai peraturan am, defendan pertama berhujah bahawa Mahkamah Tinggi berhak untuk menentukan persoalan perlembagaan pada peringkat pertama. Kecuali defendan keenam yang menerima pakai hujahan defendan pertama, defendan yang selebihnya bersetuju untuk soalan (ii) dirujuk ke Mahkamah Persekutuan untuk penentuan.

Diputuskan, menolak permohonan dengan kos:

(1) (Seksyen 84(1) AMK menggunakan perkataan 'boleh'. Ia menandakan budi bicara yang perlu dilaksanakan dengan berhati-hati. Kesan merujuk soalan adalah akan menamatkan OS. Persoalan untuk membawa pertikaian ke penghujung dengan cepat dan ekonomik dalam pengertian s 84(2) AMK tidak lagi timbul. Sebaik sahaja Mahkamah Persekutuan menjawab soalan (ii), OS akhirnya akan ditentukan. Walaupun secara prosedurnya perkara itu akan dikembalikan kepada mahkamah, secara praktikalnya, tiada apa yang perlu dibincangkan lagi. Hak pihak-pihak dalam OS akhirnya akan diputuskan sebaik sahaja soalan (ii) dijawab oleh Mahkamah Persekutuan. Penggunaan budi bicara mahkamah hanya boleh dibuat jika soalan itu, setelah dijawab oleh Mahkamah Persekutuan, akan membantu mahkamah dalam menentukan OS utama. Seksyen 84 AMK tidak direka bentuk untuk mempunyai kesan melupuskan OS secara keseluruhan, sama ada memihak kepada plaintif atau defendan. Untuk berbuat demikian akan mengakibatkan Mahkamah Persekutuan mengambil alih bidang kuasa pertama di luar skop perkara 128(1) Perlembagaan Persekutuan. Isu seperti ini,

walaupun diakui mempunyai kepentingan yang besar, tidak sepatutnya dibicarakan pada peringkat pertama di hadapan Mahkamah Persekutuan. Soalan (ii) bukanlah satu cabaran di bawah perkara 128(1) Perlembagaan Persekutuan. Tetapi untuk menarik Mahkamah Persekutuan untuk memberikan penentuan di bawah s 84 AMK akan mempunyai kesan Mahkamah Persekutuan mengambil alih bidang kuasa asal (lihat perenggan 31 & 35–40).]

Cases referred to

Alma Nudo Atenza v PP & and another appeal [2019] 4 MLJ 1, FC (refd)
Ang Pok Hong & Anor v PP [2018] 7 MLJ 590, HC (refd)
Dhinesh a/l Tanaphll v Lembaga Pencegahan Jenayah & Ors [2022] 3 MLJ 356, FC (refd)
Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of the State of Penang & Ors [2018] 3 MLJ 417, FC (refd)
Indira Ghandi a/p Mutho v Ketua Polis Negara [2016] 3 MLJ 141, FC (refd)
Mark Koding v PP [1982] 2 MLJ 120, FC (refd)
Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor [2021] 1 MLJ 750, FC (refd)
Rovin Joty a/l Kodeeswaran v Lembaga Pencegahan Jenayah & Ors and other appeals [2021] 2 MLJ 822, FC (refd)
Rethana v Government of Malaysia [1984] 2 MLJ 52, FC (folld)
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & Anor case [2017] 3 MLJ 561, FC (refd)
Teo Chee Kong v PP [2021] MLJU 1054, CA (refd)
Wee Choo Keong v Lee Chong Meng & Anor [1996] 3 MLJ 41, CA (refd)
Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases [2021] 3 MLJ 759, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 84, 84(1), (2), (4), 85(2)
Federal Constitution art 4(1), 40, 50 , 128(1), 150, 150(8), (9)

Gopal Sri Ram (with Kengadharan a/l Ramasamy) (R Kengadharan & Co) for the applicant.
Suzana bt Atan (with Narkunavathy Sundareson, Mohammad Sallehuddin bin Md Ali and Nor Aqilah Abdul Halim) (Attorney General's Chambers) for the first respondent.
Aidil bin Khalid (Amelda Fuad Abi & Aidil) for the second respondent.
M Reza Hassan (with Nurin Husnina) (Raja Riza & Assoc) for the third, fourth and fifth respondents.
Khaizan Sharizad bt Ab Razak (Seira & Sharizad) for the sixth respondent.
Muhammad Rafique bin Rashid Ali (with Nurmustanir bin Md Nor) (Law Practice of Rafique) for the seventh, eighth, ninth, tenth and 11th respondents.

Bastian Vendargon (with Annemarie Pravina Vendargon) (Bar Council Malaysia; Bastian Vendargon) for the third party.

Wan Ahmad Farid J:

[1] This is an application in encl 92, made under s 84 of the Courts of Judicature Act 1964 ('the CJA').

[2] Prayer (2) of the application seeks an order to stay the proceedings in this originating summons ('OS') to enable this court to transmit a question that has arisen as to the effect of the Constitution in the form of a special case to the Federal Court.

[3] Section 84(1) of the CJA provides:

> Where in any proceedings in the High Court a question arises as to the effect of any provision of the Constitution the Judge hearing the proceedings may stay the same on such terms as may be just to await the decision of the question by the Federal Court.

[4] In the amended OS, the plaintiff, who is an advocate and solicitor, seeks this court to determine two questions which are as follows:

(i) whether on a true construction of art 40 and 50 of the Federal Constitution, the Yang di-Pertuan Agong has an unfettered discretion not to declare an emergency despite [the] advice of the Prime Minister or the Federal Cabinet to the contrary; and

(ii) whether Act A514 which amended art 150 by adding cll (8) and (9) is violative of the basic structure of the Federal Constitution having regard to art 4(1) thereof.

[5] However, in his affidavit in encl 37 ('AIS37'), and after referring to a decided authority, the plaintiff conceded that the Yang di-Pertuan Agong should act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet.

[6] In the circumstances of the case, in para 8 of AIS37, the plaintiff asserted that question (i) has become academic since 'both parties are on common ground'.

[7] In para 9 of AIS37, the plaintiff affirmed that the only question to be deliberated and determined in the OS is question (ii). It concerns art 150(8) and (9) of the Federal Constitution.

[8] The relevant clauses of art 150 of the Federal Constitution ('the FC') are reproduced below:

> (8) Notwithstanding anything in this Constitution —
>
> (a) the satisfaction of the Yang di-Pertuan Agong mentioned in Clause (1) and Clause (2B) shall be final and conclusive and shall not be challenged or called in question in any court on any ground; and
>
> (b) no court shall have jurisdiction to entertain or determine any application, question or proceeding, in whatever form, on any ground, regarding the validity of —
>
> (i) a Proclamation under Clause (1) or of a declaration made in such Proclamation to the effect stated in Clause (1);
>
> (ii) the continued operation of such Proclamation;
>
> (iii) any ordinance promulgated under Clause (2B); or
>
> (iv) the continuation in force of any such ordinance.
>
> (9) For the purpose of this Article the Houses of Parliament shall be regarded as sitting only if the members of each House are respectively assembled together and carrying out the business of the House.

[9] The plaintiff also filed a notice of intention to use the affidavits, which he affirmed earlier in encls 2, 38 and 77.

THE PLAINTIFF'S CASE

[10] The plaintiff's position is that question (ii) ought to be determined by the Federal Court pursuant to s 84(1) of the CJA.

[11] Learned counsel for the plaintiff referred me to the judgment of the Court of Appeal in *Wee Choo Keong v Lee Chong Meng & Anor* [1996] 3 MLJ 41 (CA). The Court of Appeal took cognisance that pursuant to s 84 of the CJA, a High Court judge may, in his discretion, refer a question relating to the effect of any provision of the Constitution to the Federal Court by way of a special case. However, before deciding so, the judge must be satisfied that the constitutional question sought to be referred to must have a direct bearing on the matter of dispute before him and that the decision of the Federal Court must have the effect of bringing the determination of the dispute before him to a speedy and economical end.

[12] The plaintiff's case on the application of s 84 of the CJA is mainly anchored on the uncertainty of the law as to whether the doctrine of basic structure applies in the context of the Federal Constitution. According to learned counsel, this uncertainty of the law is based on a series of conflicting

Federal Court decisions on the basic structure. A

[13] The first school of thought which is in favour of the doctrine of basic structure as part of the Malaysian law can be seen in the judgments of the Federal Court in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & Anor case* [2017] 3 MLJ 561 (FC), *Indira Ghandi a/p Mutho v Ketua Polis Negara* [2016] 3 MLJ 141 (FC) and *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1 (FC). B

[14] The three cases were referred to by Nallini Pathmanathan FCJ as the 'trilogy of cases' in the recent judgment of the Federal Court in *Dhinesh a/l Tanaphll v Lembaga Pencegahan Jenayah & Ors* [2022] 3 MLJ 356 (FC). In the trilogy of cases, the doctrines of the separation of powers and judicial independence were re-asserted as comprising a part of the basic structure of the Federal Constitution. C D

[15] According to learned counsel, the second school of thought came in the later Federal Court judgments of *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750 (FC) and *Rovin Joty a/l Kodeeswaran v Lembaga Pencegahan Jenayah & Ors and other appeals* [2021] 2 MLJ 822 (FC). In *Maria Chin Abdullah*, Abdul Rahman Sebli FCJ, in delivering the majority judgment of the Federal Court, gave meaning to constitutional supremacy. His Lordship was of the view that to be 'inconsistent with this Constitution' simply means to be incompatible with the relevant articles of the FC and not any other doctrine of law referred to as the basic structure. In any event, art 4(1) of the Federal Constitution does not make any distinction between what is 'basic' and what is not in the whole structure of the FC. E F

[16] According to learned counsel, the legal dichotomy poses a difficult constitutional issue embedded in question (ii). G

[17] Yet, the case of *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759 (FC) demonstrated a split in judicial opinion at the Federal Court on the same issue. H

[18] My attention was then drawn to the judgment of the High Court in *Ang Pok Hong & Anor v Public Prosecutor* [2018] 7 MLJ 590, which carries the proposition that in a situation where the questions posed were unprecedented constitutional issues, a High Court should state a special case under s 84(4) of the CJA and transmit the same to the Federal Court. I

[19] Since the impugned question — according to learned counsel — is novel, the issue merits its determination by the apex court.

THE FIRST DEFENDANT'S RESPONSE

[20] The first defendant herein, the Government of Malaysia, is objecting to this application.

[21] The learned senior federal counsel ('SFC') main arguments for this application to be refused are as follows.

[22] As a general rule, the learned SFC submitted that the High Court is entitled to determine constitutional questions at first instance. First, s 84(1) of the CJA employs the word 'may', which means that it is not mandatory for the High Court to refer questions regarding the effect of any provision of the Federal Constitution to the Federal Court.

[23] The learned SFC then referred me to the judgment of the Federal Court in *Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of the State of Penang & Ors* [2018] 3 MLJ 417 (FC) and submitted that the High Court is not obliged to do so and may dispose of the questions. The Federal Court in *Gin Poh Holdings* referred the judgment of Suffian LP in *Mark Koding v Public Prosecutor* [1982] 2 MLJ 120 (FC) that it would have been better if 'the learned Judge had not referred this matter to us but instead had himself decided the constitutional questions which arose' since 'he had jurisdiction to do so'.

[24] Secondly, the remaining question to be determined in the OS is the only question (ii). By transmitting the only remaining question to the Federal Court, the learned SFC contended that it has the effect of asking the Federal Court to make a final determination at first instance. According to the learned SFC, the attempt by the plaintiff goes outside the narrow parameters of art 128(1) of the Federal Constitution. Article 128(1) of the Federal Constitution provides that the Federal Court has the exclusive jurisdiction to determine: (a) any question whether any statutory law is invalid on the ground the legislative body, either Parliament or a State Assembly, has no power to make the same; and (b) disputes on any other question between States or between the Federation and any State.

[25] In any event, once the transmitted special case has been determined by the Federal Court, s 85(2) of the CJA provides that the matter shall be remitted to the High Court for the High Court to continue and dispose of the proceedings.

[26] The learned SFC further submitted that the dispute before the High Court must be separate and distinct from the constitutional question referred to the Federal Court.

[27] It is also contended by the learned SFC, in the instant case, once question (ii) is answered by the Federal Court, it would immediately put an end to the OS since there is nothing further to be remitted to this court for deliberation and eventual determination.

THE POSITION OF OTHER DEFENDANTS

[28] Save for the sixth defendant, the Centre for a Better Tomorrow, whose counsel adopted the submission of the learned SFC, the remaining defendants are agreeable for question (ii) to be transmitted to the Federal Court for a determination.

[29] Datuk Bastian Vendargon, who represents the Bar Council as an amicus curiae, shares the same sentiment with learned counsel for the plaintiff. In short, he submitted that there is a need for certainty in this area of law, which can only be addressed by the Federal Court.

THE ANALYSIS

[30] Lest we miss the forest for the trees, let me put things into perspective. This court acknowledges that there are two separate schools of thought, as highlighted by learned counsel for the plaintiff on the doctrine of basic structure. However, irrespective of the differences, the determination of this application in encl 92 is to be guided strictly by referring to s 84 of the CJA.

[31] To begin with, as alluded to earlier, s 84(1) employs the word 'may'. It denotes discretion. There is a plethora of authorities on the proposition that the word 'may' is not mandatory, the recent one can be seen in *Dinesh Tanaphll*. However, just like any other discretion, its exercise must not be willy-nilly. It has to be exercised judiciously.

[32] The discretionary of s 84 is reiterated by the Court of Appeal in *Teo Chee Kong v Public Prosecutor* [2021] MLJU 1054, where Ravinthran Paramaguru JCA, in delivering the judgment of the court, held that:

> The power of the High Court under s 84 is discretionary. The High Court is not duty bound to refer the questions posed by a party to the Federal Court in all cases. This much is clear from the wording of s 84 and the judgment of the Federal Court in the case of *Gan Boon Aun v Public Prosecutor.*

[33] What then are the guidelines to be adhered to? My understanding of the law in the light of *Wee Choo Keong* and *Teo Chee Kong* on the application of s 84 of the CJA is as follows:

A (a) the judge must be satisfied that the constitutional question sought to be referred to must have a direct bearing on the matter of dispute before him: per Siti Norma JCA in *Wee Choo Keong*;

(b) the decision of the Federal Court must have the effect of bringing the
B determination of the dispute before him to a speedy and economical end: per Siti Norma JCA in *Wee Choo Keong*;

(c) the dispute must be related to the constitutional question sought to be referred: per Siti Norma JCA in *Wee Choo Keong*;

C (d) there must be a difficult issue or issues posed by the dispute that are irreconcilable with a constitutional provision: per Siti Norma JCA in *Wee Choo Keong*; and

(e) it was not necessary for the High Court judge to proffer any answer,
D 'negative' or 'affirmative' to the questions posed by the applicant when dismissing the application: per Ravinthran Paramaguru JCA in *Teo Chee Kong*.

[34] In the circumstances of the case, at least at this stage, I will not proffer
E any answer to question (ii). It is premature. It can only be deliberated and determined at the main hearing of this OS.

[35] However, my problem is not in recognising the difficulty of the issues raised in question (ii). My problem is the effect of referring the question is to
F put this OS to an end. There is nothing further for me to deliberate and determine in the OS. The question of bringing the dispute to a speedy and economical end within the meaning of s 84(2) of the CJA no longer arises.

G **[36]** In short, once the Federal Court answers question (ii), this OS will be finally determined. Although procedurally the matter is to be remitted to this court, practically, there is nothing to be deliberated anymore. I am bound by the doctrine of stare decisis, and once it is remitted to this court, for all intents and purposes, the rights of the parties in this OS would be finally decided once
H question (ii) is answered by the Federal Court.

[37] The exercise of my discretion can only be made if the question, once answered by the Federal Court, would assist me in determining the main OS.

I **[38]** With respect, I do not think that s 84 of the CJA is designed to have the effect of disposing of the OS in its entirety, either in favour of the plaintiff or the defendants. To do so would have the consequence of the Federal Court assuming a first instance jurisdiction outside the scope of art 128(1) of the Federal Constitution.

[39] Unless art 128(1) applies, the Federal Court should remain what it is, the final court of appeal. In the circumstances of the case, the issue of this nature, though admittedly is of grave significance, ought not to be litigated at the first instance before the Federal Court.

[40] For the avoidance of any doubt, question (ii) is not a challenge under art 128(1) of the Federal Constitution. But to invite the Federal Court to give a determination under s 84 of the CJA would have the effect of the Federal Court assuming an original jurisdiction.

[41] The limits of the exclusive original jurisdiction of the Federal Court were canvassed in *Rethana v Government of Malaysia* [1984] 2 MLJ 52 (FC). Mohamed Azmi FJ (later SCJ) reasserted the proposition that under our Constitution, the Federal Court is an appellate court and its exclusive original jurisdiction is limited. His Lordship then added:

> To extend the exclusive original jurisdiction of the Federal Court to matters which are not expressly provided by the Constitution would apart from anything else, deprive aggrieved litigants of their right of appeal to the highest court in the land.

[42] Before me, Datuk Seri Gopal Sri Ram, who appeared for the plaintiff, submitted that s 84 of the CJA is an exception to the appellate right. In any event, according to learned counsel, the matter would be reverted to this court once the question is answered by the Federal Court. In short, the right of appeal is not lost.

[43] I must concede that this line of argument is very persuasive.

[44] However, as I alluded to earlier, and based on the factual matrix and the nature of question (ii), once the Federal Court answered it, this OS would be finally disposed of. I am bound by the answer given by the Federal Court. Even if there is an appeal against my decision, the Court of Appeal too would be bound by the answer. The right of appeal would therefore be nugatory.

FINDINGS

[45] For the aforesaid reasons, my findings are as follows:

(a) the constitutional question sought to be referred to in question (ii) not only has a direct bearing on the matter of dispute before this court — it has the implication of putting an end to this OS without further deliberation by this court;

(b) the question of bringing the determination of the dispute in the OS to a speedy and economical end under s 84(2) of the CJA does no longer

arise since the OS itself, for all intents and purposes, is put to an abrupt end;

(c) the remission to this court would only be a formality;

(d) in the circumstances of the case, to refer question (ii) to the Federal Court would have the effect of the Federal Court assuming an exclusive original jurisdiction not anticipated under art 128(1) of the Federal Constitution; and

(e) since the effect of the answer to be proffered by the Federal Court would put an immediate end to the dispute, the parties would be deprived of the right of appeal.

[46] For the aforesaid reasons, the application in encl 92 is dismissed with costs in the cause.

Application dismissed with costs.

Reported by Ahmad Ismail